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No. 02-434

NOV 18 2002

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# In the Supreme Court of the United States

JEANNE WOODFORD, WARDEN OF THE CALIFORNIA STATE PRISON, SAN QUENTIN, PETITIONER,

*v.*

JAMES LESLIE KARIS, RESPONDENT.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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34 pp

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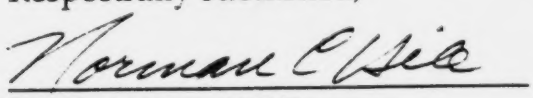
The Respondent, JAMES LESLIE KARIS ("Respondent"), requests leave to file the attached Brief of Respondent In Opposition To Petition For Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Respondent's counsel is aware that Respondent was previously granted leave to proceed *in forma pauperis* in the Supreme Court of the United States and the United States District Court of the Eastern District of California, but has no information regarding previous leaves which may have been granted prior to his retention as counsel.

No affidavit is required, inasmuch as the U.S. District Court for the Eastern District of California appointed counsel for Petitioner under the Criminal Justice Act of 1864, 18 U.S.C. § 3006A.

Respectfully submitted,



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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTION PRESENTED

Does the Ninth Circuit's ruling that trial counsel's failure to investigate and present substantial evidence of Respondent's childhood physical, sexual, and emotional abuse constituted ineffective assistance of counsel, where trial counsel could proffer "no rational justification" for his inaction, conflict with the Court's decision in *Burger v. Kemp*, 483 U.S. 776 (1987)?

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# RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## I.

## INTRODUCTION

After a jury convicted James L. Karis of first degree murder in 1982, it had to decide whether he would live or die.

With a modicum of investigation, Karis' trial counsel could have presented to the jury "substantial and wrenching evidence" of how Karis was the victim of a violent and abusive childhood, including evidence that Karis' father beat and molested him, that his father and stepfather repeatedly beat his mother in his presence, and that his stepfather subjected him to "brutal abuse." Pet. App. A at 38, 41. But trial counsel did not do so. Instead, Karis' trial counsel presented a "mitigation" case that lasted only *forty-eight minutes*. That presentation attempted to mitigate the crimes by focusing only or Karis' artistic and academic talent and the fact that he had saved his brother from drowning when he was a child. *Id.* at 40-41. The jury sentenced Karis to death. *Id.* at 14.

In his federal habeas corpus petition, Karis maintained, among other infirmities, that he received constitutionally deficient representation during the penalty phase of his capital trial. *Id.* at 7. After an evidentiary hearing presenting three weeks worth of mitigation evidence that the jury never heard because trial counsel had failed to investigate and present it, the magistrate judge made findings granting penalty phase

relief. *See* Pet. App. C. The district court judge and Ninth Circuit majority emphatically agreed. As former Chief Judge Hug wrote for the Ninth Circuit,

> It is difficult to imagine what kind of standard the State conceives would allow trial counsel to rely almost solely on testimony that Karis was artistic and had academic potential to present a mitigating case, while failing to present any evidence of such substantial abuse to the jury for consideration in making a life or death determination for Karis.

Pet. App. A at 49.

In its Petition for Certiorari, the State urges that the Ninth Circuit erred because trial counsel's failure to investigate and proffer "substantial and wrenching evidence" of Karis' nightmarish childhood was an "express strategy." Pet. at 5. But the facts show just the opposite. "Until a week prior to the penalty hearing[,] Karis' trial counsel apparently intended to give the jury information on [Karis' childhood] abuse through the testimony and report of Dr. Albert Globus." Pet. App. A at 41. But then, because there was some damaging evidence in Dr. Globus' report, trial counsel changed his mind. At that point, however, trial counsel's "lack of thorough investigation left [him] unprepared to present what he had intended to be his major mitigating evidence." *Id.* at 52. Trial counsel did not make an "articulated tactical" decision; he simply abandoned "Plan A" when there was no time to develop "Plan B." *See id.*

In urging this Court to grant certiorari, the State ignores a fundamental fact. "There was no strategic reason offered" for trial counsel's failure to present Karis' wrenching family history, even though doing so entailed "no risk." *Id.* at 51. Karis' trial counsel "provided no rational justification for his failure to pursue an investigation

into petitioner's history of family abuse." *Id.* For this reason, this case is entirely unlike *Burger v. Kemp*, 483 U.S. 776 (1987), upon which the State heavily relies. The Ninth Circuit did not fail to accord *Strickland*[1] deference to trial counsel's strategic choice; in this instance, there was simply no "strategic reason" or "rational justification" to which it could plausibly defer. *Id.* at 51.

The Court should deny the State's petition for certiorari because neither *Strickland* nor *Burger* permit, much less compel, the Ninth Circuit to turn a blind eye when a man is sentenced to death after his trial counsel fails to present "substantial and wrenching evidence" of his abusive childhood when his life is in jeopardy, and the only other mitigating evidence presented concerns his "'artistic ability, intelligence, and . . . his youth.'" *Id.* at 52 (quoting the district court). The Ninth Circuit's decision comports with Supreme Court precedent.

## II.

## STATEMENT OF THE CASE

Respondent James L. Karis, was convicted of first degree murder in 1982. Pet. App. A at 14. After Karis' trial counsel presented only forty-eight minutes of mitigation evidence, the jury sentenced Karis to death.[2] *Id.* at 40. In that forty-eight minutes, even though he was fully aware of it, trial counsel failed to present any evidence of the

---

1 *Strickland v. Washington*, 466 U.S. 668 (1984).

2 This abbreviated presentation is explained, at least in part, by the fact that penalty phase counsel spent only sixty-six hours on Karis' case total, and much of that time was in fact dedicated to assisting with the guilt phase. *See* Karis' Supplemental Appendix of Record at 5407-5420 (submitted to the Ninth Circuit with Karis' "Opposition Brief and Opening Brief on Cross-Appeal.").

"substantial and wrenching evidence of Karis' violent and abusive childhood." *Id.* at 38. Trial counsel omitted evidence that both Karis' father and stepfather beat Karis and that Karis' father sexually molested him and his half-sister. Pet. App. C at 75, 89. Instead, trial counsel relied almost entirely on "testimony that Karis was artistic and had academic potential." Pet. App. A at 49.

Karis' trial counsel acknowledged that evidence of a family history of violence and abuse was relevant to Karis' penalty phase hearing. *Id.* at 41. Indeed, trial counsel learned about such violence and abuse through a medical expert, Dr. Albert Globus, who interviewed Karis' mother, Mrs. Marie Jones. *Id.* During this interview, Dr. Globus discovered that Karis' childhood was "characterized by violence directed at his mother and himself." *Id.* at 41. Within this environment, "Karis was subjected to seeing his mother mistreated and being aware of some sexual abuse as well." *Id.* at 41-42. Mrs. Jones told Dr. Globus that Karis' father had sexually molested Karis' half-sister. Pet. App. C at 75. According to the doctor's final report, "Karis' father and stepfather's abusive attitude toward his mother set the scene for the development of an acceptance of violence as the solution to social and interpersonal problems and a low opinion of women." Pet. App. A at 41-42.

Despite learning this, trial counsel failed to do any further investigation. Then, one week before the penalty phase hearing, trial counsel decided not to call Dr. Globus as a witness or use the report trial counsel had had for months because he concluded it contained information possibly damaging to Karis. *Id.* at 42. Although this decision may have been grounded in concern that Dr. Globus' testimony could damage Karis'

case, having failed to pursue any other source of mitigation evidence of Karis' family history of abuse, trial counsel had no other evidence available to show the violence and abuse in Karis' childhood. *Id.* at 52.

The prejudice Karis suffered from trial counsel's unreasonable failure not to investigate and present evidence of childhood violence and abuse was graphically displayed at the district court's evidentiary hearing. There, Mrs. Jones testified that Karis' father, James Karis Sr., repeatedly and viciously abused her throughout their marriage and after their divorce. *Id.* at 44-46. As a small child, Karis not only witnessed the abuse of his mother, he was also a target of his father's violence. *Id.* at 45-46. Mrs. Jones described how after the divorce, Karis would return home from visits with his father with "some kind of injury – bruises on his legs, or something else that hurt him." *Id.* at 46. After one visit with his father, Karis returned home "crying uncontrollably" because of a circle-shaped burn on his hand. Pet. App. C at 89. James Sr. claimed the burn was accidentally caused by a car cigarette lighter. *Id.* at 90.

When Mrs. Jones later remarried, Karis' stepfather, Courtney Jones, continued the violence and abuse. Mrs. Jones testified how Jones would "beat the living daylights out of" her, how he repeatedly kicked and punched her, and how he threatened her with death. Pet. App. A at 47. She also testified that Jones was an alcoholic. Pet. App. C at 88. Jones also beat and abused Karis. Pet. App. A at 47-48, 50. According to Mrs. Jones, "Courtney used his big trucker's belt to beat Jimmy black and blue." Pet. App. C at 91. Jones also emotionally abused Karis, pitting Karis and his half-brother against each other and constantly referring to Karis as "just a stupid wop kid." *Id.* As a result

of Jones' "beatings, whippings, and threats," Karis was "scared to death" of his stepfather. *Id.*; Pet. App. A at 48.

Trial counsel also failed to investigate the childhood violence and abuse through questioning other family members. At the district court evidentiary hearing, several of Karis' family members testified that they were aware of the violence and abuse that Karis and his mother suffered. Pet. App. A at 48. Karis' uncle, Anthony Cancilia, testified that James Sr. admitted that he had sexually molested Karis. Pet. App. C at 89. Mrs. Jones' sister-in-law testified that she knew James Sr. was abusing Mrs. Jones during their marriage. Pet. App. A at 48. She further testified that when she cared for Karis after he had visited his father, Karis was "hard to control, easily upset, and cried a lot for no apparent reason." *Id.* at 48-49. Mrs. Jones' sister testified that she knew James Sr. "was always beating Marie up." *Id.* at 49. Even James Sr.'s brother "recalled that Jim was violent with Marie, and [that he] saw her with black eyes and bruises many times." *Id.* at 49. Mrs. Jones' family was also aware of Courtney Jones' abuse of her and Karis. *See* Pet. App. C at 86. Family member Robert Pullin testified that "everyone in the family knew Courtney beat Marie." *Id.* In addition, trial counsel failed to pursue independent sources of evidence, such as the 1961 divorce petition in which Mrs. Jones alleged extreme cruelty on the part of Courtney Jones. Pet. App. A at 48.

In *Karis v. Calderon*, Pet. App. A, the Ninth Circuit Court of Appeals upheld the district court's reversal of Karis' death sentence after finding that "the failure of counsel to present mitigating evidence made the sentencing neither fair nor reliable." *Id.* at 54. In reaching this conclusion, the Ninth Circuit relied on the test promulgated by this

Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In applying *Strickland*, the Ninth Circuit found that Karis' trial counsel's failure to pursue substantial and wrenching evidence of violence and abuse during Karis' childhood constituted deficient performance. Pet. App. A at 52. Although such evidence was available to trial counsel at the time of the penalty phase trial, trial counsel failed to offer any rational justification or strategy for not investigating the history of violence and abuse. *Id.* at 42, 48-49, 51. Because such "powerful and potentially life-saving" evidence was critical to the jury understanding Karis' violence toward women, the court concluded trial counsel's ineffective assistance prejudiced Karis. *Id.* at 48, 50, 53. Consequently, the Ninth Circuit upheld the district court's grant of penalty phase relief. *Id.* at 7.

## III.

## REASONS FOR DENYING THE PETITION

### A. The Ninth Circuit's Decision Comports With *Strickland*.

While purporting to uphold the Supreme Court's prior decision, the State, by way of this petition, actually seeks to impose a deference standard far outside this Court's jurisprudence that would be fatal to virtually every ineffective assistance of counsel claim. In the process, the State grossly mischaracterizes the Ninth Circuit's decision and the record on which it was based. The State suggests that the Ninth Circuit's unremarkable application of the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), has "ominous implications." Pet. at 7. However, what is truly ominous is the State's contention that "deference" requires that any claim by trial counsel of "strategy," no matter how unsupported by fact or reason, trumps a

defendant's Sixth Amendment guarantee of effective assistance of counsel. Under the State's view, courts are reduced to rubber stamping trial counsel's performance, even when that performance falls far below accepted professional standards. *Strickland*, 466 U.S. at 690. *Strickland* does not permit this result, much less compel it. *See id.*

*Strickland* requires "a court deciding an actual ineffectiveness claim . . . [to] judge the reasonableness of trial counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* This is exactly what the Ninth Circuit did in *Karis*. In its opinion, the Ninth Circuit exhaustively reviewed the extensive record of evidence not presented at Karis' trial but presented at the evidentiary hearing showing Karis' horrific family upbringing. Pet. App. A at 32-51. In light of *Strickland*, *Burger v. Kemp*, 483 U.S. 776 (1987), and *Williams v. Taylor*, 529 U.S. 362, 396 (2000), the Court reviewed both the standard of care that applied at the time of Karis' 1982 trial and the evidence Karis produced at the evidentiary hearing—evidence that was available to trial counsel at the time of the 1982 penalty phase trial. Pet. App. A at 48-49. It was only *after* this review that the panel majority comprised of former Chief Judge Hug and former Chief Judge Browning concluded that the district court had correctly found that trial counsel's failure to investigate and present this "powerful and potentially life-saving evidence" prejudiced Karis during the penalty phase. *Id.* at 48, 53.

In explaining its decision, the Ninth Circuit noted that at the penalty phase hearing, trial counsel presented mitigation evidence that lasted for only forty-eight minutes, and that this evidence consisted almost entirely of "testimony that Karis was

artistic and had academic potential." *Id.* at 49-50. Significant to the court was trial counsel's omission of "substantial and wrenching evidence of Karis' violent and abusive childhood," even though trial counsel was aware of it at the time. *Id.* at 50. Trial counsel neglected to present "*any* evidence of such substantial abuse to the jury for consideration in making a life or death determination." *Id.* at 49. (emphasis in original). Moreover, the court found there was "no risk of putting on evidence of the wrenching abuse of Karis and his mother." *Id.* at 52.

Because trial counsel failed to undertake an investigation necessary to support a reasonable professional judgment, the court could find no basis to conclude that Karis' trial counsel had made a strategic decision regarding his penalty phase representation. *Id.* at 50-52. Simply put, trial counsel had "no strategic reason" and "no rational justification" for failing to investigate or present evidence of wrenching abuse that posed no risk to his client. *Id.* at 51-52.

Before reaching its conclusion that trial counsel's failure constituted deficient performance, the Ninth Circuit performed *Strickland's* two-part inquiry, noting that under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 33-54; *see also Strickland* at 690-91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). In defining the "objective standard of reasonableness," the court cited Karis' *Strickland* expert who "testified without contradiction that the standard of practice [in 1982] required trial counsel to investigate,

prepare and consider presenting evidence of the client's family history, including family dynamics, any physical abuse, mental and physical illness, and the family's socioeconomic status."[3] Pet. App. A at 34 n.9. The State "presented no expert opinion to the contrary." *Id.* at 35. Indeed, the State admitted that this was the standard in its opening brief in the Ninth Circuit when it "cited to testimony of guilt phase counsel that in 1982 an attorney was expected to present mitigation in the form of childhood problems." *Id.* at 49 n.10.

The State suggests that the Ninth Circuit's finding of ineffectiveness rests primarily upon trial counsel's failure to question Karis' mother about the abuse she and Karis suffered at the hands of Karis' father and stepfather. Pet. at 6, 8, 10-11. This is incorrect. The Ninth Circuit relied on the district court's finding that trial counsel's failure to investigate or present any of the "substantial and wrenching evidence of Karis' violent and abusive childhood" was unreasonable and that trial counsel had offered no "strategic reason" or "rational justification" for this failure. Pet. App. A at 50-51. Indeed, trial counsel "testified that he was unsure why he did not interview" Karis' cousin and close personal friend Danny Howell. Pet. App. C at 73. Although

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[3] According to the *Strickland* expert's testimony,

> Penalty phase counsel was required to find and try to interview (either directly or through an investigator) all persons who were material witnesses to the client's genetic heritage, social history and life history. In particular, defense counsel was required to attempt to find and interview: the client, members of the client's immediate family, relatives and acquaintances who were percipient witnesses to the life history of the client, his parents and his immediate family, friends.

*Id.* at 34 n.9.

trial counsel's decision not to question Mrs. Jones at trial about the abuse was part of this failure, the Ninth Circuit made it clear that trial counsel also should have investigated *other* sources of evidence of this family history using evidence available at the time of the penalty phase trial. Pet. App. A at 42. This point is underscored by the court's finding that there was no reasonable basis for trial counsel's failure to investigate or present *any* evidence of childhood violence or abuse, even accepting trial counsel's explanation for not questioning Mrs. Jones about it. *Id.* at 42, 49.

If he had investigated, trial counsel would have found that Mrs. Jones alleged extreme cruelty as the grounds for her 1961 divorce of Karis' stepfather. *Id.* at 48. In addition, several of Karis' family members testified at the district court's evidentiary hearing that they were aware of the abuse by Karis' father at the time the abuse took place, more than twenty years before the penalty phase.[4] *Id.* 48-49. Because the only explanation offered by trial counsel for his failure to investigate was his decision not to call Dr. Globus or to question Karis' mother about the history of abuse, the court correctly concluded that trial counsel offered no strategic reason for his failure to pursue other sources of pertinent information. *Id.* at 51 ("Petitioner's trial counsel has provided no rational justification for his failure to pursue an investigation into petitioner's history of family abuse.").

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[4] Mrs. Jones sister and sister-in-law both testified that James Karis Sr. was abusive. *Id.* at 48-49. James Sr.'s own brother also testified that he knew James Sr. was abusive toward Mrs. Jones. *Id.* His half-brother, Anthony Cancilia, testified that Karis' father admitted that he had sexually molested Karis. Pet. App. C at 89. Mrs. Jones also told Dr. Globus that James Sr. had molested Karis' half-sister. *Id.* at 75.

Rather than engaging in "an impermissive retrospective approach based on evidence presented years after the trial," the Ninth Circuit reviewed the evidentiary showing *Strickland* requires of defendants who raise ineffective assistance claims. *Strickland*, 466 U.S. at 690 ("A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."). Moreover, all the evidence of abuse Karis presented at the district court's evidentiary hearing was available to trial counsel at the time of the penalty phase trial. *See* Pet. App. A at 48–49. As noted above, this evidence existed independent of Karis' mother and Dr. Globus.

Misconstruing the facts on which the district court and the Ninth Circuit based their decisions, the State's petition repeatedly raises trial counsel's *claim* that Mrs. Jones denied the family history of abuse. Pet. at 5. Mrs. Jones' testimony however, does not support that assertion, making it at least a factual issue. Pet. App. A at 42. This Court, moreover, is not a proper forum for resolving factual disputes. *See* Sup. Ct. R. 10 (stating that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings"). Moreover, the State's recitation of disputed facts regarding Mrs. Jones' alleged unwillingness to testify does not demonstrate that trial counsel had an "express strategy." Pet. at 5. Even assuming Mrs. Jones would have denied the abuse, her denial does not constitute a "strategic reason" for trial

counsel's failing to investigate abuse and develop evidence from other sources.[5] Pet. App. A at 50-51. Rather, her alleged denial is one factor trial counsel would have to consider in choosing a penalty phase strategy. To arrive at an "express strategy," trial counsel needed to do more than simply question Mrs. Jones.[6] *See id.*

The State *speculates* that trial counsel *may* have been concerned that his failure to question Mrs. Jones about the abuse after others testified to it may have "struck the jury as suspicious" or that questioning her about it *may* have presented the potential for impeachment. Pet. at 8. However, *Strickland* requires that courts assess trial counsel's performance *at the time it was rendered*, not on the basis of the State's later theories about what possibilities trial counsel may have considered. *Strickland*, 466 U.S. at 690. Moreover, the State ignores two significant, irrefutable facts: (1) when Mrs. Jones testified about the violence and abuse at the evidentiary hearing, she was not impeached in any way, and (2) even if there were any significant concern about asking Mrs. Jones about the abuse, other witnesses were available to testify to the abuse if trial counsel had done an investigation. In any event, under *Strickland* defense counsel could not have properly made a strategic decision and weighed the strength of this testimony without first investigating the other sources of evidence and without knowing what that testimony would be. *See id.* at 691 ("Counsel has a duty to make reasonable

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5 Mrs. Jones' testimony at the evidentiary hearing, vividly recalling the violence and abuse, suggests she would not have denied the abuse if trial counsel had questioned her about it. Pet. App. A at 44-49.

6 Moreover, there was no evidence that penalty phase counsel ever explained to Mrs. Jones the importance of her testimony regarding Karis' abusive childhood as mitigation evidence. Pet. App. C at 79.

investigations or to make a reasonable decision that makes particular investigations unnecessary."), *cited in Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (1994) ("Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client.").

Applying the 1982 standard of professional practice, the Ninth Circuit found that it "was within the range of reasonable tactics not to put [medical expert] Dr. Globus on the stand." Pet. App. A at 52. But that strategic decision "[did] not excuse the failure to present the evidence of abuse through other witnesses." *Id.* Similarly, the court noted that "[e]ven taking counsel's statements [regarding his reasons for not questioning Mrs. Jones about the abuse] as true, his failure to investigate the abuse through *other family members and witnesses* was error of constitutional magnitude." *Id.* at 42. (emphasis added).

By accepting trial counsel's statements as true—despite Mrs. Jones' testimony that trial counsel never asked her about abuse and Dr. Globus' testimony that Mrs. Jones told him about the abuse—the court afforded trial counsel a very high degree of deference. *Id.* Nevertheless, properly applying *Strickland*, the court concluded that trial counsel had offered "no strategic reason" for his failure to pursue other lines of investigation or to present evidence of abuse through other witnesses. *See id.* at 50-51. Even deferring to trial counsel's judgment, the court simply could not find any "rational justification" for trial counsel's failure to pursue other known sources of this evidence, and could not fathom how such a decision "might be considered sound strategy." *See id.*

The Ninth Circuit then turned to *Strickland's* prejudice prong, finding that trial counsel's failure "to investigate and present the highly relevant information of an abusive childhood was prejudicial" because "[a] reasonable probability exists that a jury would find this information important in understanding the root of Karis' criminal behavior and his culpability." *Id.* at 53. The court noted that the "prosecutor repeatedly stressed the absence of any testimony of mitigation throughout the penalty phase argument." *Id.* If trial counsel had undertaken a reasonable investigation, he would have been able to "put before the jury evidence contrary to the prosecution's piercing argument." *Id.* Such "powerful and potentially life-saving evidence at sentencing" would have been critical to the jury's life or death determination. *See id.* at 48. The fact that the jury deliberated over three days even without this evidence suggested to the court that "it is very likely that some jurors would have found such evidence particularly important in order to understand why he acted so violently towards women." *Id.*

Despite the State's attempted distortions of the Ninth Circuit's decision and the factual basis for it, *Karis* is merely a routine application of the *Strickland* standard to the particular facts presented. Ultimately, the court's decision reflects that, although in some circumstances trial counsel's failure to present mitigation evidence might be considered a reasonable strategic choice, this was not such a case. *See id.* at 51-52 (noting that *Burger* "has been distinguished in a number of cases in our circuit on the basis of this reasonable strategic choice"). At most, the State's argument is that the Ninth Circuit misapplied a properly stated rule of law. Even if that were true – which it

is not - the State's petition would still not satisfy this Court's standard for granting certiorari. *See* Sup. Ct. R. 10. (stating that certiorari "is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law"). In sum, the State's disappointment with the Ninth Circuit's application of *Strickland* in this case neither renders the court's analysis incorrect nor presents a sound basis for granting the State's petition. *See id.*

**B. The Ninth Circuit's Decision Comports With *Burger*.**

Like the State's analysis of *Strickland*, the State's analysis of *Burger v. Kemp*, 483 U.S. 776 (1987), is also wrongheaded. According to the State, *Burger* compels the Ninth Circuit to find that Karis received effective assistance simply because Karis' trial counsel presented some mitigation evidence during the penalty phase. Pet. at 7. But *Burger* did not rest on such a simplistic analysis of the mitigation evidence presented. If it had, *any* mitigation presentation, no matter how irrelevant, deficient, or damaging to defendant, would be fatal to a claim of ineffective assistance merely because it was more than what Burger's counsel did. More importantly, the State glosses over *Burger's* holding that a decision to forego presentation of mitigation evidence is effective assistance *only* when it is supported by reasonable professional judgment. *Burger*, 483 U.S. at 794.

Although both *Burger* and *Karis* involved defendants sentenced to death by juries that did not hear evidence of a family history of abuse, the similarity ends there. The most significant distinction between *Karis* and *Burger* is that Burger's counsel actually conducted an adequate investigation *before* making an informed, strategic decision not to present mitigation evidence. *Id.* at 792-94. In contrast to *Karis*, Burger's counsel

interviewed every potential witness called to his attention, hired and consulted with a psychological expert, and reviewed available medical reports.[7] *Id.* at 790-91. From this investigation, counsel concluded that his client would not be helped by the introduction of the evidence uncovered, because it would open the door to Burger's criminal record and other damaging historical facts otherwise unknown to the jury. *Id.* at 792-94. It was only *after* this thorough investigation that counsel selected his trial strategy and abandoned his search for further mitigation evidence. *Id.* at 795.

Unlike Burger's counsel, Karis' trial counsel only interviewed three of Karis' family members: Karis' mother, aunt, and his brother who had suffered brain damage. Pet. App. A at 42. Although trial counsel did consult with a medical expert, he decided not to use the expert's testimony about family violence and childhood abuse *only one week* before the penalty phase hearing. *Id.* at 41-42. Although trial counsel claimed his failure to question Mrs. Jones about the abuse was due to uncertainty about what she would say and her potential denial, he failed to explain why he did not question Karis' aunt or other family members about abuse and why he did not pursue other avenues of investigation. *Id.* at 42; Pet. App. C at 73 (noting that counsel was "unsure" why he failed to call Karis' cousin and personal friend Danny Howell). These family members could have testified to the physical, emotional, and sexual abuse suffered by Karis. Pet. App. C at 86, 89, 90. Rather than a strategic decision, the court found that trial counsel's

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[7] Counsel questioned Burger's mother on several occasions. *Id.* at 790-91. He also interviewed a family friend, as well as several people stationed at the same military base as Burger. *Id.* Counsel employed a psychologist to examine Burger and reviewed the results of that examination. *Id.* He also obtained and reviewed Burger's pre-existing psychological records. *Id.*

weak mitigation case resulted from the eleventh-hour abandonment of his plan to present evidence of family violence and childhood abuse through Dr. Globus. Pet. App. A at 52. "When the decision was made shortly before trial not to call Dr. Globus, the lack of thorough investigation left Karis' attorney unprepared to present what he had intended to be his major mitigating evidence." *Id.*

In further contrast to *Karis*, every affidavit later filed by Burger to describe the type of evidence his counsel should have uncovered included references to harmful facts not otherwise disclosed to the jury. *Burger*, 483 U.S. at 793. Worse still, the affidavits' references to Burger's "violent tendencies" contradicted defense counsel's "strategy of portraying [Burger's] actions on the night of the murder as the result of [accomplice] Stevens' strong influence upon his will." *Id.* Consequently, "there was a reasonable basis for [counsel's] strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Id.* at 794-95. Once "[h]aving made this judgment, [counsel] reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about Burger's past." *Id.* at 795.

Demonstrating due deference, the Ninth Circuit held that Karis' trial counsel's decision not to call Dr. Globus was grounded in concern that the doctor's report contained damaging information and was thus "within the range of reasonable tactics." Pet. App. A at 42-52. However, that did not excuse trial counsel's failure to call or even question other witnesses, particularly since "counsel was admittedly on notice from Dr. Globus' report of substantial family abuse." *Id.* at 42. Unlike *Burger* where the

record contained "absolutely no evidence that petitioner had any criminal record of any kind," *Burger*, 483 U.S. at 792, the jury in *Karis* had already learned of Karis' two prior rape convictions through the testimony of prior victims. Pet. App. A at 60. Because the jury already knew of Karis' most heinous offenses, Karis had nothing to lose by trial counsel's presentation of the evidence. *See id.* In stark contrast to *Burger*, in *Karis*, both the district court and the Ninth Circuit found that there was "no risk of putting on evidence of the wrenching abuse of Karis and his mother." *Id.* at 51.

Instead of presenting evidence of abuse, trial counsel was left to counter the testimony of two rape victims with evidence of Karis' artistic ability and intelligence. *Id.* at 52. He presented no evidence "of Karis witnessing his father and his stepfather viciously beat his mother, in addition to both men beating and abusing Karis." *Id.* at 50. He presented no evidence of Karis' molestation. *See* Pet. App. C at 89. As the Ninth Circuit held, such evidence may have helped mitigate the testimony of the prior rapes by helping the jury "understand why [Karis] acted so violently toward women." Pet. App. A at 53. Indeed, the Ninth Circuit could imagine no standard that "would allow counsel to rely almost solely on testimony that Karis was artistic and had academic potential to present a mitigating case, while failing to present *any* evidence of such substantial abuse to the jury for consideration in making a life or death determination for Karis." *Id.* at 49 (emphasis in original). Instead of challenging the prosecution's case, trial counsel's meager mitigation evidence actually provided the prosecution

fodder for its argument in favor of death.[8] Had trial counsel presented the wrenching evidence of the brutal physical, sexual and emotional abuse Karis suffered as a child, the prosecution could not have done so. *Id.* at 50.

Once the fundamental differences between the two cases are considered, *Karis* becomes entirely consistent with *Burger*. *Burger* simply holds that trial counsel need not "mount an allout investigation into petitioner's background in search of mitigating evidence" when preliminary interviews and investigation reasonably lead counsel to conclude that introducing the evidence likely to be uncovered would do more harm than good. *Burger*, 483 U.S. at 793-95. That principle has no application here, because Karis had everything to gain, and nothing to lose, from trial counsel's investigating and introducing evidence about his violent upbringing. *See* Pet. App. A at 51. Here, as in *Williams v. Taylor*, 529 U.S. 362 (2000), trial counsel's "fail[ure] to conduct an investigation that would have uncovered extensive [evidence] graphically describing [Karis'] nightmarish childhood" demonstrated that "trial counsel did not fulfill [his] obligation to conduct a thorough investigation of the defendant's background." *Id.* at 395-96. This failure constituted constitutionally deficient performance that "prejudiced

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[8] In closing argument, the prosecutor maintained that

> [W]e see Mr. Karis, not as an impoverished individual, not somebody who was void of talents, who's devoid of intellectual capacity, not somebody who, by virtue of being so poor as an individual, so lacking in ability was warped into being a killer. No, on the other hand, Mr. Karis has all of the ability, but he changed his life into that of visiting evil destruction and death on fellow human beings. . . . [D]espite Mr. Karis' abilities, despite his intellectual capacity, despite all of his talents, he has turned to base and immoral purposes.

*Id.* at 52-53.

[Karis] within the meaning of *Strickland*." *Williams*, 529 U.S. at 395-96. Accordingly, this Court should reject the State's petition for certiorari.

**C. The Ninth Circuit's General Mode Of Analysis Is Sound.**

Recognizing the weakness of its argument, the State attempts to bolster its petition by mischaracterizing Judge Hug's Ninth Circuit's opinion as "the apex of a pyramid of cases in which the Ninth Circuit has second-guessed counsel's decisions and applied the fabled twenty-twenty vision of hindsight, rather than applying the strong deferential presumption that trial counsel's conduct might be considered sound trial strategy." Pet. at 10.

Contrary to the State's claim, the Ninth Circuit has not instituted a "general mode of analysis" that gives no deference to trial counsel's decisions attacked by ineffective assistance of counsel claims ("IAC claims"). *Id.* Instead, the Ninth Circuit has applied *Strickland's* standard on a case-by-case basis, as decisions by this Court require. *See Williams*, 529 U.S. at 391 (holding that "of necessity," *Strickland* "requires a case-by-case examination of the evidence") (*quoting Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring)); *see also Strickland*, 466 U.S. at 699. Predictably, this case-by-case application has resulted in the rejection of some IAC claims and the acceptance of others.

The *Karis* decision itself disproves the State's argument that the Ninth Circuit uniformly accords no deference to counsel's avowedly strategic decisions. Karis did not just raise *one* IAC claim – he raised *four*. Employing *Strickland* deference, the Ninth Circuit rejected three of these, explicitly holding that trial counsel's conduct was

"reasonable." Pet. App. A at 26-29. Likewise, the Ninth Circuit applied *Strickland* deference to reject the petitioners' IAC claims in *Williams v. Cal. State Prison*, 306 F.3d 665, *117-18 (9th Cir. 2002), *Hayes v. Woodford*, 301 F.3d 1054, 1068 (9th Cir. 2002), *Franklin v. Johnson*, 290 F.3d 1223, 1234-37 (9th Cir. 2002), *Landrigan v. Stewart*, 272 F.3d 1221, 1225 (9th Cir. 2001), *Anderson v. Calderon*, 232 F.3d 1053, 1094 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 580 (2001), *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) and *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997), among other cases. Although the State would clearly prefer it, the Ninth Circuit's "mode of analysis" does *not* always yield the same result.

In truth, the State does not want the Ninth Circuit to apply *Strickland*, it wants it to apply a standard that compels the Court to defer to *any* claim of strategy no matter how unreasonable. The State's complaint about the Ninth Circuit's decision in *Wade v. Calderon*, 29 F.3d 1313 (9th Cir. 1994), demonstrates this point. *See* Pet. at 11. In *Wade*, counsel argued that a death sentence would be a "gift of life" to his client and failed to present mitigation evidence of abuse in his possession during the penalty phase. *Wade*, 29 F.3d at 1323-25. The Ninth Circuit found it unreasonable for Wade's counsel to forego presenting available mitigation evidence in favor of arguing in support of the execution of his own client. *See id.* The State's standard would require the Ninth Circuit to defer even when counsel's performance is this deficient. This is the standard the State conceives, but it is clearly not *Strickland's* standard.

The State's attempt to replace Strickland's standard with an exceedingly deferential one is further exemplified by its inability to discern the difference between

*Burger* and every other case in which the Ninth Circuit found ineffective assistance. The Court found that *Burger's* counsel provided his client effective assistance because the preliminary investigation he conducted gave him a "reasonable basis for his decision" to forego presentation of certain mitigation evidence. *Burger*, 483 U.S. at 794-95. Burger's counsel halted his investigation only *after* he reasonably became convinced him that Burger's "history would not have minimized the risk of the death penalty." *Id.* But, in each of the cases the State cites, the court found just the opposite: that counsel's performance was *not* supported by reasonable investigation and thus was *not* the result of a tactical decision.[9] *See* Pet. App. A at 51-52 (noting that "*Burger* has been

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[9] *See, e.g., Gentry v. Roe*, 300 F.3d 1007, 1113-14 (9th Cir. 2002) (finding counsel's performance deficient because counsel's closing argument failed to argue that state failed to meet its evidentiary burden, omitted facts helpful to defendant, highlighted immaterial, damaging evidence, and referred to client as "jailbird," "drug addict," and "stinking thief"); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) (noting that "at a minimum, [counsel must] conduct a reasonable investigation enabling him to make informed decisions about how to best represent client" and concluding that counsel's failure to interview conflicting eyewitnesses regarding petitioner's role in shooting before selecting defense constituted deficient performance prejudicial to petitioner); *Visciotti v. Woodford*, 288 F.3d 1097, 1111-14 (9th Cir. 2002) (finding deficient performance where counsel failed to investigate and discover mitigating evidence of "overwhelming mitigating circumstances in an absolutely horrendous family history" because of ignorance of types of evidence jury could consider), *rev'd on other grounds, Woodford v. Visciotti*, 2002 U.S. LEXIS 8312 (U.S. Nov. 4, 2002); *Phillips v. Woodford*, 267 F.3d 966, 980 (9th Cir. 2001) (noting that trial counsel admitted to believing alibi defense presented was unreasonable and that he would have presented alternative defense if he had certain evidence, which was later determined to be in his possession at time of trial), *cert. denied* Oct. 21, 2002 (issue concerned right to self-representation); *Jackson v. Calderon*, 211 F.3d 1148, 1162 (9th Cir. 2000) (finding ineffective assistance where counsel failed to investigate or prepare readily available mitigation evidence because counsel did not expect to reach penalty phase and did not believe evidence would help once "guilt phase [was] over"), *cert. denied, Woodford v. Jackson*, 531 U.S. 1072 (2001); *Caro v. Calderon*, 165 F.3d 1223, 1224 (9th Cir. 1999) (remanding for evidentiary hearing on counsel's failure to investigate affect of chronic and extensive exposure to pesticides on

distinguished in a number of cases in our circuit on the basis of this reasonable strategic choice"); *Silva v. Woodford*, 279 F.3d 825, 844 (9th Cir. 2002) (noting that decisions in *Burger* and similar cases denying ineffective assistance claims all came in cases in which "trial counsel had already investigated and prepared such evidence beforehand so as to make an informed decision about trial strategy and had reasonable grounds for electing to present such evidence at trial"). Notably, this Court has declined to review nearly every Ninth Circuit decision about which the State complains. *See, e.g. Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002), *cert. petition filed* Oct. 18, 2002; *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002), *cert. denied, Woodford v. Caro*, 122 S.Ct 2645 (2002); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002), *cert. denied, Woodford v. Silva*, 2002 U.S. LEXIS 7365 (U.S. Oct. 7, 2002); *Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001), *cert. denied* Oct. 21, 2002; *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000), *cert. denied, Woodford v. Jackson*, 531 U.S. 1072 (2001); *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) ), *cert. denied, Woodford v. Caro*, 527 U.S. 1049 (1999); *Wade v. Calderon*, 29 F.3d 1313 (9th Cir. 1994), *cert. denied, Calderon v. Wade*, 513 U.S. 1120 (1995). [10]

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defendant's mental ability), *cert. denied, Woodford v. Caro*, 527 U.S. 1049 (1999); *Wade v. Calderon*, 29 F.3d 1313, 1323-25 (9th Cir. 1994) (finding ineffective assistance where counsel failed to re-present guilt phase evidence of abuse in mitigation during penalty phase and argued death penalty would be "an escape" and "gift of life" freeing defendant from mental illness), *cert. denied, Calderon v. Wade*, 513 U.S. 1120 (1995).

[10] This Court recently reversed the Ninth Circuit 's opinion in *Viscotti v.* Woodford, 288 F.3d 1097 (9th Cir. 2002). *See Woodford v. Visciotti*, 2002 U.S. LEXIS 8312 (U.S. Nov. 4, 2002) (per curiam). However, *Visciotti* is not analogues to the present case. *Visciotti* was decided using post-AEDPA standards of 28 U.S.C. 2254(d), which permit a federal court to grant a habeas petition only if the state court decision is both an incorrect and an unreasonable application of clearly established federal law. *Woodford v. Visciotti*, 2002 U.S. LEXIS 8312, at *13 (U.S. Nov. 4, 2002) (per curiam); *see* § 2254(d);

The Ninth Circuit may not be employing the standard the State desires, but *it is* applying the *Strickland* standard. For this reason also, this Court should deny the State's petition for certiorari.

## IV.

## CONCLUSION

The Ninth Circuit did not hold, as the State would have this Court believe, that Karis' trial counsel should have conducted a "scorched earth" investigation to provide constitutionally adequate representation. Pet. at 13. Rather, it upheld the district court's finding, made after a three-week evidentiary hearing, that there was no strategic reason for trial counsel's failure to pursue and present for the jury's life or death determination readily available evidence that Karis was the victim of substantial and wrenching childhood violence and abuse. *Strickland* and *Burger* do not just permit the Ninth Circuit's conclusion; they compel it. The State's contrary assertion is an attempt

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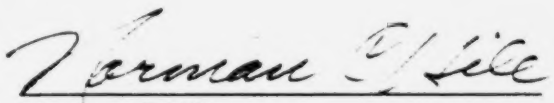
*Williams v. Taylor*, 529 U.S. 362, 410-11 (2000). In contrast, the pre-AEDPA standard applies to *Karis*. Pet. App. A at 18 n.1. Under the pre-AEDPA standard, federal courts may reverse an incorrect state court conclusion, even if the conclusion is reasonable. *Williams*, 529 U.S. at 410-11. Moreover, even under the post-AEDPA standard, *Visciotti* is inapplicable as it involved the Ninth Circuit's reversal of a California Supreme Court decision on the merits reached after an evidentiary hearing. *In re Visciotti*, 14 Cal. 4th 325, 356-57, 926 P.2d 987, 1006 (1996). In *Karis*, however, the state court never ruled on the merits of Karis' ineffective assistance claims and never held an evidentiary hearing. *See* Pet. App. A at 15 (noting that California Supreme Court rejected Karis' appeal without holding evidentiary hearing); *Karis v. Vasquez*, 828 F.Supp. 1449, 1466 (E.D. Cal. 1993). Rather, the only evidentiary hearing regarding Karis' claims was in the U.S. district court. *See* Pet. App. A at 15-16. Thus, the desire for comity expressed in § 2254(d) is not at issue here, since there is no state court decision on the merits of Karis' claim. *See Woodford v. Visciotti*, 2002 U.S. LEXIS 8312, at *8.

to eviscerate the Sixth Amendment right to counsel by adopting a standard so deferential as to be meaningless.

Because the opinion of the Ninth Circuit is entirely consistent with *Strickland*, *Burger* and *Williams*, the State's petition for certiorari should be denied.

Respectfully submitted,



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